

ACCC REGULATORY CONFERENCE

AUGUST 2023

‘Regulating Telecommunications services to benefit all consumers’.

Michael Cosgrave- Speaking Notes

Welcome to Country

One of the obvious reasons for the organisers of this conference to pose the ‘Beyond Efficiency?’ question is the soon to be legislated introduction into the National Electricity Objective and the National Gas Objective of a climate change consideration.

Our colleagues next door are examining the implications of what is undoubtedly an enormously challenging transition with the decarbonisation of energy markets.

In the longer than a quarter of a century since the fundamentals of our telecommunications regime were enacted, Australia has undertaken an equally substantial transition both in its communications infrastructure and the services it enables. Late last century, governments were seeking to promote open entry to telecommunications markets and regulators would worry about the accessibility implications of timed long distance calls on the Telstra copper network – I know I did! Fixed and mobile networks were predominantly designed for the delivery of voice traffic and were in the relatively early stages of digitisation.

Today, every report I read and just about every Ministerial press release rightly describes communications infrastructure and the services it enables as 21st century essential services. While we do not have an overarching National Broadband Strategy in this country, we do have a Digital Economy Strategy that is predicated on ubiquitous connectivity. Governments and corporations are both continuing to develop systems that encourage the online delivery of programs and services. Increasingly consumers are being encouraged or are being given little choice in an online interaction becoming the primary way of getting things done.

So, with that in mind, there are a couple of issues I’d like to briefly explore in this presentation. Each of these examinations given the 15 minutes that I have is necessarily cursory and intended to prompt further inquiry.

1. Firstly, there is the question of whether our regulatory building blocks in telecommunications set 25 years ago have stood the test of time? That involves looking at the objects and regulatory policy of the Telecommunications Act, and the objects of the telecommunication provisions of the Competition and Consumer Act, as well as the Energy Laws.
2. Secondly, I’d like to look at some aspects of the implementation of the Accessibility objective in the Telecommunications Act, particularly as it relates to regional and rural consumers and attempt to answer some questions. Do traditional Universal Service schemes have a place in a world with a ‘fully built’ NBN, mobile networks with increased coverage (and congestion), and a patchwork quilt of remote solutions? What are the implications of voice USO arrangements with a copper continuity obligation, and the Statutory Infrastructure Provider scheme with peak speed obligations. And thanks to my colleagues at Plum Consulting, what are some of the approaches to seeking to ensure universal high-speed connectivity in other jurisdictions.

-
-
3. Finally given their currency, I thought I'd take a quick look at how the regulatory framework in Telecommunications continues to shape the objective of delivering Appropriate Community/Consumer Safeguards.

1. Have our regulatory building blocks in telecommunications stood the test of time? – Examining the objects and regulatory policy of the Energy Laws, the Telecommunications Act, and the telecommunication provisions of the Competition and Consumer Act

If you ask most consumers of essential services like energy and communications what their expectations are in relation to those services, it's unlikely that many other than the trained economists or the regulatory nerds are going to say efficiency. It's more likely that they'll talk in terms of price or affordability, quality, reliability and particularly still in communications availability. People might, if pressed, recognise the roles of competition, and efficient investment in and use of infrastructure in maximising outcomes in meeting those expectations.

Objects clauses in legislation are important. Ideally, they reflect those expectations and provide broad guidance to regulators on how best to promote them. There are usually multiple objectives that are sought to be advanced, often in tension with each other and requiring discretion in their application.

Objectives provide a framework that goes beyond the issues of the day, but as the current debates in energy demonstrate, objectives can change. New objectives can emerge and the relative importance of existing objectives can shift. Legislators have a responsibility to reflect those changes in legislation.

When you look comparatively at differently expressed objectives across energy and communications the common thread is the words 'the Long-Term Interests of Consumers (or End Users)'. It is an elegant phrase that points regulators to the primacy of consumer interests. The interests of consumers might be broader than the interests of users of the service, but that's something for another day and I'll use the terms interchangeably.

The phrase clearly incorporates a consideration of efficiency concepts. As an AER publication explains, the concept of the 'long term' recognises that there is an inherent trade-off between consumers today, and consumers in the future. Changes that may be in consumers' short-term interests may not be in their long-term interests if those changes undermine incentives to make efficient investments and operational decisions over time.

Whether long term consumer interests can also incorporate a consideration of what are often termed equity considerations may depend on the overall legislative scheme and the use of the phrase in each objects clause.

In energy the current objective, including in the National Energy Retail Law is 'to promote efficient investment in, and efficient operation of (energy markets) for the Long-Term Interest of Consumers'. This promotion is to be done "for" the long-term interests of consumers. As the courts have determined, it does not involve a balance as between efficient investment, operation and use on the one hand and the long-term interest of consumers on the other. Rather, the legislative premise is that the long-term interest will be served by regulation that advances economic efficiency.

That causal linking has certainly guided the interpretation that regulators in the energy sector have taken, and presumably is one of the reasons that policy makers who want factors other than efficiency to be taken into account are seeking to amend the objective.

In the telecommunications specific access regime in the Competition and Consumer Act (CCA), regard can only be had to the promotion of competition, any to any connectivity and efficient investment in, and use of infrastructure in determining whether a particular thing promotes the

Long-Term Interest of End Users. That specific limitation on the assessment of what is in end users' long-term interests presumably reflects that the CCA regime is ECONOMIC regulation. I have certainly heard some economists express the view that the test as defined in the Competition and Consumer Act is a good proxy for an efficiency test. I think that it's the right test in that context.

It does however also suggest that the Long-Term Interest of Consumers is susceptible to a broader interpretation when considered in other contexts.

The Telecommunications Act is a broad piece of legislation that deals with a range of issues affecting the sector that go beyond its economic regulation, including matters as diverse as critical infrastructure provisions whose primary concern is national security and the provision of universal service.

Its object since 1997 has been to provide a regulatory framework that promotes:

(a) the long-term interests of end-users of carriage services or of services provided by means of carriage services; and

(b) the efficiency and international competitiveness of the Australian telecommunications industry; and

(c) the availability of accessible and affordable carriage services that enhance the welfare of Australians.

I have a few observations on this objective. Efficiency considerations as you would expect are explicitly included, although they are referred to only in relation to producer interests. Consideration of the long-term interests of end users is not subject to any causal link to another objective, or limited in how it can be interpreted.

Equally though, it is not further defined, and I have surprisingly struggled to find any ACMA or ACCC guidance document where the term is sought to be further interpreted in the context of this Act.

That may not matter, given the explicit reference in the main objective to accessibility and affordability as separate matters. The ACMA clearly takes a range of factors beyond efficiency into consideration in many of its decisions.

The Act also provides a shopping list of 'other' objectives without any guidance of the interrelationship between the main objective and these other objectives. These objectives include the provision of appropriate community safeguards in relation to telecommunications activities. The second reading speech makes clear that the universal service obligation is a primary community safeguard.

And just to show that some issues don't change even when technology does, there is an objective of the promotion of responsible practices in relation to the sending of marketing faxes.

So, while the wording of some of the 'other' objects of the Telecommunications Act could certainly use a tweak to bring them into the 21st century, in my view the framework at the objects level continues to provide a solid basis for the regulation of telecommunication services.

Before I leave this 'building blocks' discussion, I just want to touch on the 'Regulatory Philosophy' provision in the Telecommunications Act. I have not in my experience seen this type of provision replicated in other infrastructure regulation outside the communications sector.

The Parliamentary statement of intention provides;

The Parliament intends that telecommunication be regulated in a manner that promotes the greatest practicable use of industry self-regulation; and does not impose undue financial and administrative burdens on participants in the Australian industry; but does not compromise the effectiveness of regulation in achieving the objects

Views can differ around the extent to which this statement of regulatory policy constrains regulatory action where intervention is warranted. There is a degree of circularity here. Whilst it is always useful to remind regulators that regulation is not costless and can impose 'burdens' on the regulated entity, the ultimate objective appears to remain the effectiveness of regulation.

One area where the regulatory philosophy in the Telecommunications Act continues to stimulate debate is in the provision of appropriate community, or consumer, safeguards and the legislative provisions around industry codes that shape the debate. I'll return to that later in the presentation.

2. Do traditional Universal Service schemes have a place in a world with a 'fully built' NBN, mobile networks with increased coverage (and congestion), and a patchwork quilt of remote solutions? What are the implications of voice USO arrangements with a copper continuity obligation, and the Statutory Infrastructure Provider scheme with peak speed obligations. And thanks to my colleagues at Plum Consulting, what are some of the approaches to seeking to ensure universal high-speed connectivity in other jurisdictions.

So, if the regulatory framework is sufficiently enabling and if Governments of all persuasions have increasingly seen high speed connectivity as an essential service and a prerequisite to an increasingly digital economy, what are some of the issues around promoting the availability of accessible and affordable services that is part of that main objective in the Telecommunications Act?

I'm not going to talk about affordability other than to acknowledge that the availability of baseline products on the NBN has been an ongoing source of concern to the ACCC in its regulatory processes. Separately, ACAAN has been a constant advocate for a product to be developed by NBN that retailers could make available to low-income consumers.

What I do want to touch upon is accessibility for regional and remote consumers. My views on this topic are largely formed by my membership of the 2021 Regional Telecommunications Independent Review Committee. I'm conscious that I'm being followed by Kristy Sparrow, another member of that Committee who actually lives in remote Australia and Daniel Featherstone, who is talking to the particular accessibility challenges confronted by First Nations Australians. Both should be seen as more authoritative on the challenges faced by consumers.

My commentary goes to the more general issue of the continuing relevance or otherwise of the universal service regimes that have been the principal policy interventions that seek to promote accessibility in remote areas.

In the telephony era, the construction of a near ubiquitous copper network led to the establishment of a statutory Universal Service Obligation on the incumbent Telstra to provide 'reasonable access' to telephony and pay phones on an equitable basis, which still exists. The coverage condition in the initial mobile licences in the 1990s was also pivotal in the shaping of the Australian infrastructure roadmap, particularly with the later advent of network upgrades and devices supporting mobile broadband.

This all changed with the biggest public policy intervention in telecommunications of this century, the construction of the National Broadband Network, an intervention that would have been illegal in Europe under European Commission State Aid Rules and may not have happened in this country if we hadn't been in the midst of the Global Financial crisis. The regulation of a startup wholesale monopolist and the structural separation of Telstra were always going to create a myriad of regulatory challenges which continue to play out to this day.

From an accessibility perspective, one of these challenges was the continuing provision of voice services during the construction of the NBN. Voice using copper or other legacy technology might be thought by many to be something of an irrelevancy in this era of broadband videoconferencing, but it continues to play an important redundancy role, particularly for those whose broadband is supplied by NBN's two Geostationary Satellites using the Skymuster brand, themselves destined to reach end of life by early next decade.

This was sought to be addressed in 2012 as part of the Definitive Agreements, a suite of agreements between Telstra and the Commonwealth establishing the framework for Telstra's involvement in the rollout of the NBN.

The Telstra USO Performance Agreement, or TUSOPA, a 20-year agreement running through to 2032 essentially incorporated the statutory USO requirement into a contractual arrangement with an additional commitment that Telstra maintained 'copper continuity' to provide ongoing voice services. Telstra is paid about \$300 million a year to perform the necessary but diminishing task of providing voice services, initially while the NBN was being built but increasingly as a matter of practicality to those areas where voice is not delivered by either the NBN via VoIP or expanding mobile coverage, and to provide payphone services.

In 2019, the NBN was declared to be 'fully built', although it is still now subject to significant upgrades on its fibre and wireless networks in particular. Upgrades to the wireless network, which from recent ACCC Measuring Broadband reports appear to have ameliorated substantial performance issues with that network have led to consequential product improvements as congestion eases on the satellite network.

Concurrently, Federal and State Governments have been investing through place based, co-investment grants programs such as Mobile Blackspots and Regional Connectivity in expanding the connectivity footprint. While broadly successful, they have not been without issue. The former program in particular, has led to concerns with funding being sufficient to establish service, but not requiring additional carrier investment as usage inevitably increases, leading to severe congestion issues. Additionally, uncoordinated action by different levels of Government has led to what the most recent RTIRC called 'a patchwork quilt of connectivity'

What the 2019 NBN declaration did allow Government to implement however was to deliver a second set of availability provisions and a first generation Broadband Universal Service Guarantee (USG). The Statutory Infrastructure Provider (SIP) regime unsurprisingly designates NBN as the default 'must supply' broadband provider for the whole of Australia other than small areas covered by 17 other providers and gives the Minister broad powers to set service standards for SIP providers. SIPs are also required to provide voice services in fibre and wireless but not satellite areas. Like most other universal service schemes, rules set a minimum level of allowable performance, in this case by designating an asymmetric peak speed of at least 25Mbps for download and 5Mbps for upload. That is a peak speed requirement. There is not currently any minimum busy hour throughput.

There remains considerable scope for improvement. The current arrangements, particularly around the USO are a source of universal frustration. Telstra are frustrated that they are required to deliver their services via copper, where other jurisdictions, notably the EU, now define their availability expectations in terms of a suite of services to be delivered by any technology. Consumers are frustrated that while averaged performance indicators are met, many have a poor experience with aging copper infrastructure. Policy makers are presumably frustrated in a desire to modernise the availability regime by a 20-year contractual agreement that because of the interrelated Definitive Agreements between Telstra and the Commonwealth, no one knows how to get out of.

The RTIRC made recommendations in relation to both the USO and USG. It provided qualified support to a technology agnostic approach to voice delivery of the USO, if that led to increased reliability standards for consumers and addressed mobile congestion issues.

Given rapidly escalating demand, the RTIRC recommended an annual review of minimum USG standards, including download and particularly upload speeds for small business with a move to set busy hour speeds to match actual customer experience.

Of course, technology improvements always have the potential to provide a step change to the availability debate. The potential for Low Earth Orbit (LEO) satellite constellations to provide both voice and broadband services has been known for a number of years, but even in 2021 after the entry in Australia of the most well-known provider Starlink, the RTIRC was cautious on what role the technology would play in the technology mix, given rain fade and affordability issues. These may well be overcome.

I do think that in the next few years, we will need to more closely analyse and map residual connectivity gaps after the extensive investments in the NBN and other place based mobile blackspot and regional connectivity programs. Putting in place a mobile coverage regime that is not reliant on carrier information would be one small step towards a much more comprehensive understanding of where connectivity gaps occur than we have today.

Only then can we determine whether there are more targeted and potentially less expensive interventions that still need to be made. It is unlikely that we can or should get to a stage where all Universal Service Obligations can be abolished in favour of more flexible, needs based voucher schemes for individual consumers, as has happened in France, Sweden and Denmark, but it should be possible to scale back the arrangements we have in place back to a single set of requirements with guaranteed performance obligations.

3. How our regulatory framework in Telecommunications continues to shape the objective of delivering Appropriate Community (Consumer) Safeguards

Firstly, a disclosure. I have been appointed by Communications Alliance, the industry organisation, as an Independent Advisor to advise its Board on the adequacy and transparency of its process to review the current Telecommunications Consumer Protection Industry Code (TCP Code), which sets out provisions for how telcos interact with their residential and small business consumers and currently contains provisions. The Code is registered with the ACMA.

The need for consumer protections in addition to those contained within the Australian Consumer Law has not been a source of contention since at least the development of the first TCP Code over a decade ago. That is hardly surprising, given the increasingly essential nature of the services provided over telecommunication networks.

What have been and remain contentious are the framework under which Industry Codes are developed, their enforceability and their content. Given the TCP Code is subject to a review process which is reviewing that content and in which I am actively involved, my comments go only to the first two of those areas.

The term most frequently used by the ACMA to describe the industry Code provisions in the Telecommunications Act is Co-Regulation, a term not used in the Act. The ACMA generally uses the term Co-Regulation to describe a process where, at the request of the regulator, the industry develops proposals and voluntarily submits them for approval and registration by the regulator. Once registered, it is the regulator who has responsibility for the Code's enforcement.

Where a code is not approved by the ACMA, it has the power to make a mandatory enforceable industry standard. The Minister also can direct the ACMA to develop an industry standard. The only standard implemented on consumer protections is the Complaint Handling Standard of 2018, developed after a Ministerial direction. As many in this room would be aware, the current Minister has signalled her intention to direct the ACMA to make a Standard on financial hardship provisions.

A couple of observations about Industry Codes in the communications sector.

The Part of the Act containing the industry code provisions introduces consideration of the public interest. It intends that the ACMA will act in a way that enables public interest considerations, defined as including the efficient, equitable and economically sustainable provision of service, to not impose undue financial and administrative burdens on industry participants.

It is also clear from the examples of matters on which codes and standards could be dealt with set out in the Act, as well as from the Second Reading Speech that consumer protections were central to the establishment of the regime. They include information about terms and conditions, the establishment and reporting of quality of service performance indicators, the handling of customer complaints, privacy and customer disconnection.

Industry Codes have been developed across many facets of sector activity other than consumer protections. They generally work well where the interests of the sector participants are aligned or where interoperability is required to address a regulatory direction. Long standing provisions in relation to number portability or in the days of yore, codes enabling access to the incumbent's local loop are good examples.

They tend to be more problematic either where the interests of industry players do not align, or where they seek to define the relationships between the sector and other interest groups, such as content providers or in this case consumers.

That is not to suggest that regulator-imposed provisions such as the AEMC's National Energy Retailer Rules, or Ofcom's Consumer Protection Conditions are the only or even necessarily the optimal model for the development of additional community or consumer protections.

Propose/ Respond models of regulation are not unusual in the communications and online sector. Access undertakings given by regulated entities to ward off possible regulatory arbitrations or in the case of the NBN, a possible access determination, have been a feature of the regulatory landscape for many years.

The Industry Code/ Community Safeguard provisions of the Telecommunications Act have largely been replicated in the 2021 Online Safety Act, where the ESafety Commissioner as recently as June of this year approved five Industry Codes but decided not to register two others on the basis that they failed to provide appropriate community safeguards to deal with illegal and harmful content online and has commenced the development of Industry Standards

The usual arguments for having propose/respond mechanisms in the regulatory toolkit is that in the right circumstances they can lead to greater flexibility and adaptability of outcomes and provide an ability to harness industry knowledge and expertise to address industry-specific and consumer issues directly. Where issues are complex, information asymmetry increases the prospects of regulatory error.

However, where Industry Codes are the primary initial means for the provision of additional consumer protections, the processes by which they are developed and assessed, the extent to which they are complied with, and how they are enforced by the regulator are all paramount to maintaining consumer confidence.

What is clear is that there appears to be a broad growing recognition of the need for legislative reform in some guise. The consumer organisation ACAAN and the Telecommunications Industry Ombudsman have called for direct government regulation to replace the current provisions. The ACCC has repeated long held concerns with a 2-step enforcement process and the level of maximum financial penalties under the Telecommunications Act. Communications Alliance in a recent presentation proposed amendments to the Act to provide 'all Consumer-related Industry Codes to be directly enforceable- not voluntary in the first instance and thereafter enforceable' as well as a ACMA registration process for all service providers.

The Government indicated earlier this year that it is actively considering the consumer safeguards framework to determine whether it remains fit for purpose. This follows a revised Statement of Expectations to the ACMA late last year where the Government supported the ACMA acting proactively and expediently to minimise harm, including by being more directive in setting expectations for the development of industry codes.

How best to ensure additional consumer protections in telecommunications is likely to remain contentious for the immediate future.